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Zedelta Sdn Bhd v Mayland Supreme Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-143–07 OF 2022
ALIZA SULAIMAN J
9 JANUARY 2023

C *Building and Construction Law — Subcontracts — Direct payments to subcontractor — Application pursuant to s 30 of the Construction Industry Payment and Adjudication Act 2012 by subcontractor — Whether there was money payable by principal to party against whom adjudication decision was made at the time when written request was made pursuant to s 30(1) of Construction Industry Payment and Adjudication Act 2012 — Construction Industry Payment and Adjudication Act 2012 s 30(1), (2) & (3)*

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The defendant in the present case was the developer of a construction project ('the project') whereas a company known as CR Sea (M) Sdn Bhd ('CR Sea') was the main contractor of the project. The plaintiff in the present case was appointed as the nominated subcontractor (NSC) in relation to electrical services for the said project. Problem arose between the plaintiff and CR Sea whereby the former failed to pay for the work completed by the plaintiff. The plaintiff then obtained adjudication decision for an order, inter alia, that CR Sea to pay the outstanding sum ('the adjudicated sum') to the plaintiff. As no payment was made by CR Sea, the plaintiff's solicitors had issued a letter dated 2 June 2022 to request for direct payment of the adjudicated sum, interest and costs from the defendant as the principal of CR Sea pursuant to s 30(1) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') ('the written request'). The defendant then sent a notice dated 7 June 2022 pursuant to s 30(2) of the CIPAA to CR Sea ('the written notice') but CR Sea did not respond to the said notice. On the same date, the defendant had also written to the plaintiff's solicitors refuting any liability to pay the sum as demanded by the plaintiff ('the defendant's letter') and further stated in the last paragraph of the said letter that the defendant's reply to the written request shall not be taken as an admission of liability of the requested sum ('the exclusion'). The plaintiff then filed the present action pursuant to s 30 of the CIPAA for an order that the defendant to make direct payment of the adjudicated sum to the plaintiff. The sole issue to be considered by the court was whether there was money due or payable by the defendant to CR Sea at the time of receipt of the written request on 2 June 2022.

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Held, allowing the plaintiff's application:

(1) The plaintiff had correctly submitted that following the plaintiff's averment that there was money due or owing by the defendant to CR Sea as at 2 June 2022, the evidential burden then lay on the defendant to prove otherwise with the standard of proof being on a balance of probabilities. However, the court found that the last paragraph in the defendant's letter was of no assistance to the defendant in discharging the evidential burden by labelling it as an 'exclusion'. The defendant's duty under s 30 of the CIPAA did not end with the issuance of the written notice. Section 30(3) of the CIPAA was clear in its intent that there was a mandatory obligation on the defendant to pay the adjudicated amount directly to the plaintiff if no proof of payment was forthcoming from CR Sea. The defendant could not be allowed to claim that it was attempting to facilitate the direct payment process and then later, to change its stance by giving excuses in not complying with the mandatory obligation under s 30(3) of the CIPAA. In the circumstances, the defendant had not discharged the evidential burden to prove that there was no money due or payable to CR Sea at the time of its receipt of the written request (see paras 27–29).

(2) For the sake of consistency in its decision on s 30 of the CIPAA, the court followed the pronouncement of court in the case of *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58 ('*Bond*'s case') and therefore, interest on the adjudicated sum at the rate of 5%pa was allowed, but it was to be calculated from the date of the decision of the court until full settlement. As at the date of the grounds of judgment of the present case, the Court of Appeal had, on 9 December 2022, decided in the appeals related to *Bond*'s case that a proper construct of the term 'adjudicated amount' in s 30 of the CIPAA would include both interest and costs awarded in the adjudication decision (see paras 31–32).

[Bahasa Malaysia summary

Defendan dalam kes ini adalah pemaju sebuah projek pembinaan ('projek tersebut') manakala syarikat yang dikenali sebagai CR Sea (M) Sdn Bhd ('CR Sea') adalah kontraktor utama projek tersebut. Plaintif dalam kes ini telah dilantik sebagai subkontraktor yang dinamakan (NSC) berhubung perkhidmatan elektrik untuk projek tersebut. Masalah timbul antara plaintif dan CR Sea yang mana CR Sea telah gagal untuk membayar kerja yang telah disiapkan oleh plaintif. Plaintif kemudiannya memperoleh keputusan adjudikasi untuk perintah, antara lain, agar CR Sea membayar jumlah yang tertunggak ('jumlah adjudikasi') kepada plaintif. Memandangkan tiada bayaran dibuat oleh CR Sea, peguamcara plaintif telah mengeluarkan surat bertarikh 2 Jun 2022 untuk memohon pembayaran terus jumlah adjudikasi, faedah dan kos daripada defendan sebagai prinsipal CR Sea menurut s 30(1) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') ('permohonan bertulis'). Defendan kemudian menghantar notis bertarikh

7 Jun 2022 menurut s 30(2) APAIP kepada CR Sea ('notis bertulis') tetapi CR Sea tidak menjawab notis tersebut. Pada tarikh yang sama, defendan juga telah menulis kepada peguam cara plaintif menafikan apa-apa liabiliti untuk membayar jumlah yang dituntut oleh plaintif ('surat defendan tersebut') dan seterusnya menyatakan dalam perenggan terakhir surat tersebut bahawa jawapan defendan kepada permohonan bertulis tersebut tidak boleh dianggap sebagai pengakuan liabiliti bagi jumlah yang diminta ('pengecualian'). Plaintif kemudiannya memfailkan tindakan semasa menurut s 30 APAIP untuk perintah supaya defendan membuat pembayaran terus jumlah yang diadjudikasi kepada plaintif. Satu-satunya isu yang perlu dipertimbangkan oleh mahkamah ialah sama ada terdapat wang yang tertunggak atau perlu dibayar oleh defendan kepada CR Sea pada masa penerimaan permohonan bertulis tersebut pada 2 Jun 2022.

Diputuskan, membenarkan permohonan plaintif:

(1) Plaintif telah berhujah dengan betul bahawa berikutan dakwaan plaintif bahawa terdapat wang tertungak atau terhutang oleh defendan kepada CR Sea pada 2 Jun 2022, beban pembuktian kemudiannya terletak pada defendan untuk membuktikan sebaliknya dengan standard pembuktian adalah pada imbangan kebarangkalian. Bagaimanapun, mahkamah mendapati perenggan terakhir dalam surat defendan tersebut tidak membantu defendan dalam melepaskan beban pembuktiannya dengan melabelkannya sebagai 'pengecualian'. Kewajipan defendan di bawah s 30 APAIP tidak berakhir dengan pengeluaran notis bertulis tersebut. Seksyen 30(3) APAIP jelas dalam tujuannya bahawa terdapat kewajipan mandatori ke atas defendan untuk membayar jumlah yang diadjudikasi terus kepada plaintif jika tiada bukti pembayaran dikeluarkan oleh CR Sea. Defendan tidak boleh dibenarkan untuk mendakwa bahawa ia cuba memudahkan proses pembayaran terus dan kemudiannya, mengubah pendiriannya dengan memberi alasan untuk tidak mematuhi kewajipan mandatori di bawah s 30(3) APAIP. Dalam keadaan tersebut, defendan gagal melepaskan beban pembuktian untuk membuktikan bahawa tiada wang yang tertunggak atau perlu dibayar kepada CR Sea pada masa penerimaan permohonan bertulis tersebut (lihat perenggan 27–29).

(2) Demi ketekalan dalam keputusannya berkenaan dengan s 30 APAIP, mahkamah mengikuti keputusan mahkamah dalam *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58 ('kes *Bond*') dan oleh itu, faedah ke atas jumlah yang diadjudikasi pada kadar 5% setahun dibenarkan, tetapi ia perlu dikira dari tarikh keputusan mahkamah sehingga penyelesaian penuh. Pada tarikh alasan penghakiman kes ini, Mahkamah Rayuan telah, pada 9 Disember 2022, memutuskan dalam rayuan yang berkaitan dengan kes *Bond* bahawa satu takrifan yang betul bagi istilah 'adjudicated amount' dalam s 30 APAIP adalah termasuk kedua-dua

faedah dan kos yang diberikan dalam keputusan adjudikasi (lihat perenggan 31–32).]

Cases referred to

Antah Schindler Sdn Bhd v Maju Holdings Sdn Bhd [2023] 8 MLJ 331, HC (refd)
Bond M&E Sdn Bhd v Pali PTP Sdn Bhd [2022] 11 MLJ 58, HC (folld)
CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd [2018] MLJU 471, HC (refd)
Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311, HC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158, FC (refd)
Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd [2021] MLJU 474, HC (refd)
HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case [2021] 8 MLJ 347, HC (refd)
MKP Builders Sdn Bhd v Turnpike Synergy Sdn Bhd [2021] MLJU 1473, HC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Peck Chew Piling (M) Sdn Bhd v Panzana Enterprise Sdn Bhd [2022] MLJU 390; [2022] 5 MLRH 423, HC (refd)
R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22, SC (refd)
Zeta Letrik Sdn Bhd v JAKS Island Circle Sdn Bhd [2022] MLJU 392, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 4, 30, 30(1), (2), (3), (4)
Evidence Act 1950 s 103
Rules of Court 2012 O 42 r 12

Lau Weng Ann (WA Lau & Partners) for the plaintiff.
Andrew Davis (Andrew Davis & Co) for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] This is an application by the plaintiff for the defendant to make direct payment to the plaintiff pursuant to s 30 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA') of the adjudicated amount as decided in the adjudication decision dated 22 March 2022 ('AD') by the learned adjudicator Sr Chine Wai Ting, Jacky

('adjudicator') in the adjudication proceedings between the plaintiff (claimant) and CR Sea (M) Sdn Bhd (respondent; 'CR Sea').

[2] In the originating summons ('OS'), the plaintiff prayed for, among others, an order:

> 1) That the defendant shall make direct payment of RM2,668,897.25 as principal of CR SEA (M) Sdn Bhd to the plaintiff in relation to the adjudication decision dated 22-03-2022 ..., in particular paragraphs 57(a)–(d) as follows:-
>
> (a) Adjudicated Sum of RM2,529,177.19;
>
> (b) Interest at the rate of 5%pa on the Adjudicated Sum of RM2,529,177.19 from 26 November 2021 until full settlement;
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> (c) Legal and incidental costs of RM37,589; and
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> (d) Costs of the Adjudication proceedings in the sum of RM37,342.55;
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> 2) that the cost of this application shall be paid by the defendant to the plaintiff; ...

[3] After hearing oral submissions by the learned counsels who represented the parties on 10 November 2022, and having considered the cause papers and both the oral and written submissions, the court had, on 24 November 2022, allowed prayers 1(a) and (2) of the OS. The court also ordered that interest on the sum of RM2,529,177.19 ('adjudicated sum') at the rate of 5%pa from 24 November 2022 until full settlement and costs of RM5,000, subject to allocatur, be paid by the defendant to the plaintiff.

[4] On 23 December 2022, the defendant filed a notice of appeal against the aforesaid decision. Hereinbelow are my full grounds of judgment.

THE CAUSE PAPERS

[5] The related cause papers are as follows:

(a) the originating summons ('OS') dated 19 July 2022 (encl 1);

(b) the plaintiff's affidavit in support ('AIS') affirmed by its Director, Mr Norman Shazly bin Mohd Daim on 19 July 2022 (encl 2);

(c) the defendant's affidavit of ('AIR') affirmed by its Group Legal Manager, Mr Victor Peh Suan Ean on 11 August 2022 (encl 5); and

(d) the plaintiff's AIR affirmed by the same deponent on 17 August 2022 (encl 6).

SALIENT BACKGROUND FACTS

[6] The plaintiff is a private limited company with its registered business address at No 54-A, 1s Floor, Jalan Cerdas, Taman Connaught, Off Jalan Cheras, 56000 Kuala Lumpur. It is involved in the business of supply and installation of electrical and mechanical services in the building industry.

[7] The defendant is a private limited company with an address at 31st Floor, Menara May, No 7 Jalan Munshi Abdullah, 50100 Kuala Lumpur. Its business is in real property and housing development.

[8] The defendant is the employer of a housing project known as 'Cadangan Pembangunan 2 Blok Pangsapuri Perkhidmatan 41 Tingkat yang Mengandungi':

(a) Bilik-bilik Mekanikal & Elektrikal, Kebuk Sampah dan 7 unit Ruang Perniagaan (Aras P1);

(b) 1 Tingkat Basemen Tempat Letak Kereta dan Motosikal (Aras P1);

(c) 8 Tingkat Podium Tempat Letak Kereta dan Motosikal (Aras P1A: P7A);

(d) Tingkat Bawah: Satu Tingkat Kemudahan Komuniti;

(e) Tingkat 1 hingga Tingkat 35 (700 Unit Kediaman); dan

(f) Sebuah Pondok Pengawal

Di Atas Lot PT 24012, Mukim Batu, Wilayah Persekutuan Kuala Lumpur ('Project').

[9] By a letter of acceptance dated 8 March 2018, the defendant had appointed CR Sea as the main contractor for the project.

[10] By the letter of award for nomination of subcontract: electrical services dated 16 July 2018, the defendant had informed the architect, Messrs SN Low & Associates Sdn Bhd of its intention to nominate the plaintiff as the nominated subcontractor ('NSC') for the project and requested that the architect issues the architect's instruction ('AI') to CR Sea accordingly.

[11] Subsequently, by the letter of acceptance dated 23 July 2018, CR Sea referred to the AI and on behalf of the defendant, had confirmed the award of 'The Supply, Delivery, Installation, Testing & Commissioning and Maintenance & Servicing of Electrical Services' for the project to the plaintiff for the firm price sum of RM15m ('subcontract').

[12] The plaintiff and CR Sea then became entangled in a dispute which ended up with the plaintiff commencing adjudication proceedings against CR

Sea pursuant to the CIPAA to seek payment for work done under the subcontract which was certified and valued by the architect in the Progress Certificate and Valuation Nos 34, 35, 36, 37R, 38 and 41 in the total sum of RM2,529,177.19.

[13] In para 57 of the AD, the adjudicator determined that:

...

a. ... the Claimant's Adjudication Claim is successful and the adjudicated amount payable by the Respondent to the Claimants is RM 2,529,177.19

b. Pursuant to subsection 25(o) of the CIPAA, the Respondent shall pay to the Claimants interest on the adjudicated amount calculated at the rate of 5%pa on the sum of RM 2,529,177.19 beginning on 26th November 2021 and continuing until the adjudicated amount together with interest is paid.

c. Legal and incidental costs incurred by the Claimant to be borne by the Respondent, at RM 37,589 comprising RM 35,000 legal costs and RM 2,759 incidental cost.

d. Costs of the Adjudication proceedings is to be borne by the Respondent pursuant to Section 18(1) of CIPA Act 2012 in the amount of RM 37,342.55 which includes Adjudicator's fees and expenses in the amount of RM 30,810.70, and AIAC fees at RM 6,531.85 including SST.

e. The adjudicated amount, and costs are to be paid on or before 6th April 2022 in a form of a secured financial instrument.

[14] On 1 April 2022, the plaintiff's solicitors served a copy of the AD on CR Sea and demanded for the payment of the adjudicated sum, interest and costs as determined by the adjudicator.

[15] As no payment was made by CR Sea, the plaintiff's solicitors issued the letter dated 2 June 2022 to request for direct payment of the adjudicated sum, interest and costs from the defendant as the principal of CR Sea pursuant to sub-s 30(1) of the CIPAA ('written request').

[16] Upon receipt of the written request, the defendant sent the notice dated 7 June 2022 to CR Sea pursuant to sub-s 30(2) of the CIPAA ('written notice') for CR Sea to show proof of payment that it has made to the plaintiff within ten working days from the date of the notice, failing which the defendant shall proceed to make direct payment to the plaintiff. On the same date, the defendant wrote to the plaintiff's solicitors refuting any liability to pay the sum as demanded by the plaintiff.

[17] CR Sea did not respond to the written notice.

THE PLAINTIFF'S CASE

[18] The plaintiff's application is made pursuant to s 30 of the CIPAA which reads as follows:

30 Direct payment from principal

(1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.

(2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.

(3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

[19] In *Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd* [2021] MLJU 474, this court said in para 24 of the judgment that:

Proceeding next to the conditions which have to be satisfied before the plaintiff can invoke the remedy in s 30 of the CIPAA, there is an ever-growing body of case law on point (see among others, *Murni Environmental Engineering Sdn Bhd v Eminent Ventures Sdn Bhd & Anor and other suits* [2016] MLJU 691; *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2017] MLJU 2275 (HC); *HMN Nadhir*; *B Cor Geotechnics*; *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] 3 MLRH 83 which are listed in footnote 41 at p 201 in Lim Chong Fong, *Malaysian Specialist Intellectual Property and Construction Courts: Practice and Procedure*, Sweet & Maxwell, 2020). The conditions are that

(a) there must be an adjudication decision whereby the winning party is entitled to an adjudicated amount which is to be paid by the losing party;

(b) the losing party has failed to pay the adjudicated amount to the winning party;

(c) the winning party has made a written request to the principal for the adjudicated amount to be paid directly to the winning party;

(d) the principal did not serve a written notice to the losing party to show proof that the losing party has paid the adjudicated amount to the winning party or having served such notice, the losing party has failed to furnish the proof of payment and in any event, the principal did not pay the adjudicated amount directly to the winning party; and

(e) there is money due or payable by the principal to the losing party at the time when the principal receives the written request for payment from the winning party.

[20] After having perused the cause papers and the written submissions of the parties, the court finds that:

(a) there is no dispute that the defendant is the 'principal' of CR Sea within the meaning of s 4 of the CIPAA;

(b) the plaintiff has fulfilled the following conditions under s 30 of the CIPAA:

(i) there is an adjudication decision whereby the plaintiff is entitled to an adjudicated amount, which consists of the adjudicated sum, interest and costs, to be paid by CR Sea ie the AD dated 22 March 2022;

(ii) that CR Sea has failed to pay the adjudicated amount to the plaintiff;

(iii) the plaintiff has made a request for the defendant to pay the adjudicated amount directly to the plaintiff under sub-s 30(1) of the CIPAA vide the written request; and

(iv) the defendant has issued the notice under sub-s 30(2) of the CIPAA to CR Sea vide the written notice requesting that CR Sea to show the proof of payment of the adjudicated amount to the plaintiff within 10 working days from the date of the written notice ie 7 June 2022, failing which the defendant shall proceed to make direct payment to the plaintiff upon the expiry of ten working days. In the written notice, the defendant has also made it clear that it will recover any direct payment amount as a debt or set off from any money due or payable by the defendant to CR Sea pursuant to sub-s 30(4) of the CIPAA.

CR Sea has failed to furnish such proof of payment. However, the defendant did not pay the adjudicated amount directly to the plaintiff as it said it would in the written notice.

[21] In view of the above stated findings, and as acknowledged by the learned counsels who represented the parties on the hearing date, the only issue which

arises for consideration is whether there is a sum of money due or payable from the defendant to CR Sea at the time when the defendant received the written request.

THE SOLE ISSUE: WHETHER THERE IS MONEY DUE OR PAYABLE BY THE DEFENDANT TO CR SEA AT THE TIME OF RECEIPT OF THE WRITTEN REQUEST ON 2 JUNE 2022

[22] In the AIS and AIR, the plaintiff averred that:

(a) there is money due or payable by the defendant to CR Sea and this belief is premised on the fact that construction works for the defendant's project is still ongoing and there would be money due or payable by the defendant as the employer to CR Sea as the main contractor under the main contract;

(b) in cl of the letter of acceptance for the main contract, the defendant has agreed to release payment directly to all NSC and nominated supplier upon receipt of the payment certificate duly certified by the architect;

(c) as CR Sea did not reply to the written notice, then, pursuant to sub-s 30(3) of the CIPAA and the defendant's own stance as stated in the written notice, the defendant ought to make direct payment of the adjudicated amount to the plaintiff;

(d) the defendant may recover the amount paid as a debt or set off from any money due or payable to CR Sea pursuant to sub-s 30(4) of the CIPAA; and

(e) the defendant's averment that it is in the midst of referring the dispute that it has with CR Sea in respect of the main contract to arbitration based on cl 34 of the main contract, is merely a bare assertion unsupported with any proof and in any event, is irrelevant to the subcontract and has no effect on the defendant's obligation to make direct payment to the plaintiff as provided under sub-s 30(3) of the CIPAA.

[23] Mr WA Lau, in submitting for the plaintiff, emphasised that the defendant, as the principal, has the evidential onus to prove that there is no money due or payable to CR Sea at the time of the defendant's receipt of the written request. To support his submission, the learned counsel referred to s 103 of the Evidence Act 1950 (Act 56), which provides that 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person', and to a line of decisions in *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2018] MLJU 471, *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case*

[2021] 8 MLJ 347, *MKP Builders Sdn Bhd v Turnpike Synergy Sdn Bhd* [2021] MLJU 1473 and *Glocal Tech*.

[24] In defending the application, the defendant argued that the defendant had complied with the requisites of sub-s 30(2) of the CIPAA in having issued the written notice. Furthermore, in the defendant's letter to the plaintiff's solicitor on 7 June 2022, it was made clear that the defendant, in complying with the said statutory provision, was not making any admission of liability. Hence, no adverse inference can be drawn against the defendant for not making the direct payment to the plaintiff.

[25] Mr Andrew Davis cited the comprehensive judgments of the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 and *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 to draw the attention of the court as to how a statute is to be interpreted. The passage which was highlighted in the former case appears at pp 193–194 and 197 of the law report and it reads:

> [68] ...
>
> ... In NS Bindra's *Interpretation of Statutes* (10th Ed), the learned author said as follows (at pp 373–374):
>
> > A court has to interpret law as it stands. Costello J, in *Abdur Rahman v Emperor* AIR 1935 Cal 316; (1935) ILR 62 Cal 749 says we have to administer and apply as accurately as lies in our power the precise words of the relevant statutory enactment. It is the duty of the court to construe the provisions of an enactment and to construe them according to the language used. Courts are bound to apply the law as it is made and cannot enter into the question of what it should have been, however, laudable the object behind the latter is. In *Sadananda Pyne v Harinam Sha* AIR 1950 Cal 179, Their Lordships observed:
> >
> > Courts must resist the temptation to change the law under cover of interpretation of law. If they use their power to interpret law, to alter laws which they may not like, and to make new laws which they think should be made, that would be a corrupt use of their power.
> >
> > The function of the court is to interpret the law and not to amend, modify, or alter it. It cannot add to or subtract words while interpreting it; neither is it competent for any court to imply a provision which is not in the statute for remedying an omission. The court has necessarily to carry out the law as it stands unless it is proved to be ultra vires and it cannot rectify an alleged injustice caused by any valid legislative enactment.
>
> [75] ... In NS Bindra's *Interpretation of Statutes* (10th Ed), the learned author said (at p 435):
>
> > It is elementary that the primary duty of a court is to give effect to the intention of the Legislature as expressed in the words used by it and not outside consideration can be called in aid to find that intention. A statute must be

> constructed in a manner which carries out the intention of the legislature. The intention of the legislature must be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it. When the language of the law admits of no ambiguity and is very clear, it is not open to the courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.
>
> Thus, where there is no ambiguity, it is the duty of the courts to construe the plain terms of the statute and give them their legal effect.

Whilst the excerpt from the latter case can be seen at p 786 of the law report where the Chief Justice had referred to the recent UK Supreme Court judgment in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 and stated that:

> [31] The majority of the UK Supreme Court (Lord Carnwath, Lady Hale and Lord Kerr), essentially decided the case as a matter of statutory construction. Lord Carnwath addressed the ouster clause as follows:
>
> > [111] ... Judicial review can only be excluded by 'the most clear and explicit words' (Cart, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind.

[26] The defendant additionally argued that it has placed an exclusion in the last paragraph of the defendant's letter to the plaintiff's solicitor on 7 June 2022 as shown in bold below:

> ...
>
> We refute and deny that the Principal is liable to pay for the interest, adjudicator cost, legal cost and incidental cost totalling RM139,720.06 for the breach of the Main Contractor, CR Sea (M) Sdn Bhd.
>
> As for the Adjudicated Sum of RM2,529,177.19, we have already requested the Main Contractor to show all payments proof for the Adjudicated Sum within 10 working days pursuant to s 30(2) of the CIPAA 2012 in order to determine whether there is payment due to you by the Main Contractor and if so what is the actual sum due. We shall reply once the Main Contractor replied. We appreciate if you could send us a copy of the Adjudicated Decision for our perusal.
>
> *Please note that by replying to your Notice of Request and the content of the letter above shall not be taken as an admission of liability of the above Requested Sum on our part. We are attempting to facilitating the direct payment as required by CIPAA 2012.*

[27] To begin the analysis of this issue, the plaintiff has correctly submitted, based on the case authorities as cited earlier, that, following the plaintiff's averment that there is money due or owing by the defendant to CR Sea as at

2 June 2022, the evidential burden then lies on the defendant to prove otherwise with the standard of proof being on a balance of probabilities.

[28] In my view, the last paragraph in the 7 June 2022 letter as highlighted above is of no assistance to the defendant in discharging the evidential burden as alluded to earlier by labelling it as an 'exclusion'. This is because:

(a) in its AIR, the defendant merely averred that there is no basis for the plaintiff to claim the sum of RM2,668,897.25 and that the defendant does not owe that amount or any amount to CR Sea (see paras 14 and 17). Further, the defendant is said to be in the midst of referring the dispute that it has with CR Sea to arbitration, however, no notice of arbitration, correspondence or any document whatsoever was exhibited to support these averments;

(b) in the correspondence prior to the filing of the OS, the defendant never informed the plaintiff or the plaintiff's solicitors that there is no money due or payable by the defendant to CR Sea as at 2 June 2022;

(c) in the written notice, the defendant stated its commitment that it shall make direct payment to the plaintiff upon expiry of the ten working days deadline. As submitted by the plaintiff, the defendant's duty under s 30 of the CIPAA does not end with the issuance of the written notice. Sub-section 30(3) of the CIPAA is clear in its intent that there is a mandatory obligation on the defendant to pay the adjudicated amount directly to the plaintiff if no proof of payment is forthcoming from CR Sea; and

(d) the defendant cannot be allowed to claim that it is attempting to facilitate the direct payment process and then later, to change its stance by giving excuses in not complying with the mandatory obligation under sub-s 30(3) of the CIPAA.

[29] In the circumstances, the court finds and holds that the defendant has not discharged the evidential burden to prove that there is no money due or payable to CR Sea at the time of its receipt of the written request.

THE 'ADJUDICATED AMOUNT' IN S 30 OF THE CIPAA

[30] The plaintiff's counsel was well aware of the different views taken by the High Court in *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311 and *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58 as to whether the words 'adjudicated amount' in s 30 of the CIPAA include interest and costs as awarded in the AD. It was for this reason that Mr WA Lau submitted that, if this court was minded to follow its previous decision in *Bond*'s case, the plaintiff prayed that the court awards interest at the

rate of 5%pa on the adjudicated sum from the date of the AD until the date of full payment as such interest is the normal rate of interest payable on a judgment sum in accordance with O 42 r 12 of the Rules of Court 2012.

[31] Suffice to say that this court was so minded, for the sake of consistency in its decisions on s 30 of the CIPAA, to follow the pronouncement in *Bond*'s case (see *Peck Chew Piling (M) Sdn Bhd v Panzana Enterprise Sdn Bhd* [2022] MLJU 390; [2022] 5 MLRH 423, *Zeta Letrik Sdn Bhd v JAKS Island Circle Sdn Bhd* [2022] MLJU 392 and *Antah Schindler Sdn Bhd v Maju Holdings Sdn Bhd* [2023] 8 MLJ 331) and therefore, interest on the adjudicated sum at the rate of 5%pa was allowed, but it is to be calculated from the date of the decision of the court until full settlement.

[32] As at the date of this grounds of judgment, the Court of Appeal has, on 9 December 2022, decided in the appeals related to *Bond*'s case that a proper construct of the term 'adjudicated amount' in s 30 of the CIPAA would include both interest and costs awarded in the adjudication decision.

CONCLUSION

[33] Based on the foregoing considerations, the plaintiff's application was allowed and the decision was pronounced as earlier stated in para 3 of this judgment.

Plaintiff's application allowed.

Reported by Dzulqarnain Ab Fatar